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SHARP LABORATORIES OF AMERICA, INC.  
C/O LAW OFFICE OF GERALD MALISZEWSKI  
P.O. BOX 270829  
SAN DIEGO CA 92198-2829

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DEC 15 2008

**OFFICE OF PETITIONS**

**ON PETITION**

In re Application of  
Guy Eden  
Application No. 09/859,660  
Filed: May 16, 2001  
Title of Invention: System and Method for  
Discovering Available Network Components

This is a decision on the petition filed September 13, 2008 under 37 CFR 1.137(a).

The petition to revive under 37 C.F.R. § 1.137(a) is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 C.F.R. § 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. § 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This above-identified application was held abandoned for failure to timely file a supplemental appeal brief. A Notice of Non-Compliant Appeal Brief pursuant to 37 CFR 41.37 was mailed on September 28, 2006 providing applicant with an extendable one month period for reply. A non compliant appeal brief was submitted on October 30, 2006. A Communication Re: Appeal was mailed on February 15, 2007 informing applicant that the October 30, 2006 appeal brief was dismissed because the supplemental appeal brief failed to comply with the 37 CFR 41.37 (c). Since there were no allowed claims the dismissal of the appeal resulted in the abandonment of the Application.

Petitioner maintains that the supplemental appeal brief submitted on October 30, 2006

----- made a good faith effort to meet the requirements of 37 CFR 41.37 (c)(1)(v).----- As such  
petitioner maintains that there was no valid reason to dismiss the appeal.

**Petition to revive under 37 CFR 1.137(a)**

A grantable petition under 37 C.F.R. § 1.137(a) must be accompanied by:

- (1) the required reply,<sup>1</sup>
- (2) the petition fee,
- (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The examiner has reviewed the March 9, 2007 appeal brief and has stated the appeal brief is compliant.

The instant petition lacks item (3).

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Director that the delay was unavoidable within the meaning of 37 C.F.R. § 1.137(a).

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Director to have been "unavoidable." See, 37 C.F.R. § 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

Petitioner's argument has been considered but is not persuasive. Petitioner on renewed petition contends that compliant briefs were previously submitted. However, the Office made a determination which was reflected in the March 6, 2007 interview summary and the Notices mailed on September 28, 2006 and October 17, 2006 that the appeal briefs submitted at that point were not compliant. If appellant disagreed with the examiner's

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<sup>1</sup> In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

holding of noncompliance, the appropriate remedy was a petition filed under 37 CFR – 1.181. See MPEP 1206. Any arguments regarding the appropriateness and sufficiency of the Notice of Non-Compliance and the Notice of Abandonment should have been addressed in a timely petition submitted under 37 CFR 1.181 for which the Office of Petition's does not have the jurisdiction to review. See MPEP 1002.02 ( c). Instead petitioner acquiesced to the Notice of Non-Compliance with the submission of the

Accordingly, petitioner has failed to provide any facts or evidence that warrant a finding of unavoidable delay.

## Alternative Venue

Petitioner may wish to consider filing a petition to revive based on unintentional abandonment under 37 CFR 1.137(b). A grantable petition pursuant to 37 C.F.R. § 1.137(b) must be accompanied by the required reply, the required petition fee, and a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. § 1.137(b) was unintentional.

The filing of a petition under 37 C.F.R. § 1.137(b) cannot be intentionally delayed, and therefore, must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 C.F.R. § 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 C.F.R. § 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

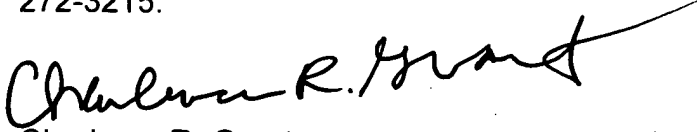
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Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-3215.

A handwritten signature in black ink, reading "Charlema R. Grant". The signature is written in a cursive style with a long, sweeping horizontal line extending from the end of the name.

Charlema R. Grant  
Petitions Attorney  
Office of Petitions